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No. 82-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,

v.

THE UNITED STATES

PETITIONER'S REPLY MEMORANDUM

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The United States urges this Court to let stand the ruling below that Indians holding land under aboriginal title have fewer legal rights to protection against trespass than white persons under any form of possession known to the law. All cases to the contrary are distinguished on the sole ground that they "did not involve aboriginal title" (U.S. Br. at 8)—in other words, that they were not Indian claims. The general rule is that even trespassers in possession can assert trespass claims against persons who interfere with their possession. *E.g.*, *Shively v. Bowlby*, 152 U.S. 1, 38 (1893); *Restatement (Second) of Torts* § 157, Comment b, § 158 (1965). Such claims, once accrued, could not be taken away without payment of just compensation for their taking. But, in the government's view, Indian rights are different.[1] This position has no support in American law.

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[1] Thus, the trespassing oil companies could have accrued causes of action against other trespassers—causes of action which, since

The government's position rests wholly upon the following reasoning:

> (i) The Inupiats' trespass actions are part of or based on their aboriginal title.
>
> (ii) The United States can take aboriginal title without compensation.
>
> (iii) Therefore, the United States can take the trespass actions without compensation.

See U.S. Br. at 8. Both the premise and logic of this argument are flawed.

The Inupiats' trespass actions were not part of their aboriginal title; once trespasses occurred and causes of action accrued against the trespassers,[2] these claims were property rights separate and distinct from the Inupiats' limited interest in their land.

The fact that the Inupiats' trespass claims were based on or grew out of their aboriginal title, which the United States could take without compensation, does not lead to the conclusion that the Inupiats' trespass claims could also be taken without compensation. "Aboriginal title" is nothing more than the name given to the common law possessory rights of aboriginal occupiers of land as those rights have been declared by this Court. *See, e.g., Tee-*

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in no way could they be said to depend upon aboriginal title, could not be taken by the government without the payment of just compensation. Only the Indians, in the government's view, lack such protection.

[2] Under classic common law definitions, such accrued claims were termed "choses in action" and were clearly distinguished from "choses" (items of personal property) and "real things" (items of real property). *See Black's Law Dictionary* 305, 1431 (4th ed. 1951). The United States' argument here that the Inupiats' "choses in action" and their real property interests were the same would be rejected out of hand in a common law court.

Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). To say that the Inupiats' trespass claims grew out of or were based on aboriginal title is simply to say that they grew out of or were based on the common law.

This Court has repeatedly held that rights that grow out of or are based on the common law—accrued causes of action—are constitutionally protected property, although the common law itself (*e.g.*, the rules of aboriginal title) is not a protected property right. Thus, Congress can repeal or amend common law prospectively at any time without compensation. However, once a cause of action has accrued under the common law, that cause of action is constitutionally protected and cannot be taken in the absence of due process and just compensation.

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. *Rights of property which have been created by the common law cannot be taken away without due process*; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. . . ." Munn v. Illinois, 94 U.S. 113, 134.

Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1, 50 (1912) (emphasis added); *accord*, *Coombes v. Getz*, 285 U.S. 434, 442 (1932).

The Inupiats' accrued trespass claims—valuable rights to collect damages from third parties—were distinct items of property at the time the United States took them. Under black-letter constitutional law, just compensation must be paid for that taking. Petitioner is therefore entitled to a hearing on the merits of its claim.

Respectfully submitted,

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